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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 811.

WILLIAM J. LUDWIG,
Appellant,

vs.

AMERICAN GREETINGS CORPORATION,
Appellee.

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

JURISDICTIONAL STATEMENT.

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JURISDICTIONAL STATEMENT.

STATEMENT AS TO JURISDICTION.

The appellant, pursuant to the United States Supreme Court rule No. 10, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the final decree of the United States Court of Appeals for the Sixth Circuit, affirming a judgment of the United States District Court for the Northern District of Ohio, Eastern Division. This final decree was entered in this civil action on November 29, 1960.

OPINIONS BELOW.

The Circuit Court of Appeals delivered two separate written opinions on this case under Case Nos. 13549 and 14053 filed respectively on March 11, 1959 and October 12, 1960. No written opinion was had on the petition for rehearing but the final order dismissing and denying the

rehearing was filed November 29, 1960. Copies of the written opinions and the final order are attached to this jurisdictional statement.

JURISDICTION.

The appeal herein is from a final decree made and entered by the United States Circuit Court of Appeals for the Sixth Circuit ordered and filed November 29, 1960 upon the plaintiff-appellant's complaint for treble damages upon alleged violations by the defendant-appellee of Title 15, paragraph 13, U. S. C., which is also referred to as Section 1 of the Robinson-Patman Act as amending Section 2 of the Clayton Act.

The final decree appealed from was made and entered on November 29, 1960. Notice of appeal was filed in the United States Circuit Court of Appeals for the Sixth Circuit on the 23rd day of February, 196[illegible]

The Supreme Court of the United States has jurisdiction to review by certiorari, the judgment and decree complained of by provisions of 28 U. S. C., paragraph 1254.

QUESTIONS PRESENTED.

(a) Is the good faith competition defense provided in Section 13 (b), Title 15, paragraph 13 U. S. C. known as Section 1 Robinson-Patman Act Amendment of Section 2 of the Clayton Act available to a defendant in a civil action for treble damages alleging and proving violations of Sections (d) and (e) of Section 13, Title 15 U. S. C.?

(b) Does this record reveal a good faith competition defense which is available to the defendant against the admitted acts which are in violation of sub-section (d) and (e), Title 15, paragraph 13 U. S. C.?

QUESTIONS PRESENTED ARE SUBSTANTIAL.

A. Although there are no constitutional questions presented by this appeal, the issue raised as to the right to use the good faith competition defense in cases other than those instituted by the United States Government has never been ruled upon by this Court. The ruling of the United States Court of Appeals for the Sixth Circuit in this matter is in direct conflict with the interpretation of the case of *Standard Oil Co. vs. Federal Trade Commission*, 340 U. S. 231, 263 *et seq.*

B. The District Court of the United States, and the Court of Appeals for the Sixth Circuit erred in ruling that the defense, which they say is available, to-wit, the good faith defense, is not an affirmative defense requiring the defendant to go forward and produce evidence to prove. The ruling had by both of the courts below through their holding indicates that the plaintiff either upon his direct examination or cross-examination can negate the necessity of the defendant showing in truth and in fact that good faith competition was the complete defense available to the defendant in the civil actions for treble damages.

STATEMENT OF THE CASE.

In this statement, the plaintiff-appellant, William J. Ludwig, will be referred to as "plaintiff"; the defendant-appellee, American Greetings Corporation, as "defendant."

Defendant, at all times involved in this litigation, was an Ohio corporation with its principal place of business located in the City of Cleveland, Ohio. Defendant was engaged in the business of manufacturing and selling greeting cards appropriate for use on holidays and other occasions, together with related products such as paper and ribbon for wrapping gifts. In its business operations

it had become one of the three or four largest firms in the United States engaged in the manufacture and sale of greeting cards. While the defendant manufactures most of its products at its plant in Cleveland, Ohio, it sells such products through numerous customers located in various parts of the United States for resale within such places to ultimate consumers. It is conceded in this case that the defendant at all times involved was engaged in interstate commerce as defined in the several anti-trust laws of the United States, having shipped its products from Ohio to its retail purchasers, located both in Ohio and other states.

Since the latter part of the year 1947, and continuing until April 1954, plaintiff, as an individual, was engaged in the business of purchasing from manufacturers and reselling at wholesale to various retail customers and purchasers greeting cards appropriate for use on various occasions, which constituted a competitive product to the greeting cards manufactured, sold and distributed by the defendant. The territory in which plaintiff did business included chiefly Stark and Summit Counties in the State of Ohio, where he was, during the years mentioned, in direct and substantial competition to the operations and business of the defendant.

Shortly after plaintiff began to engage in business, the defendant developed a policy, on a local basis, directed to Stark and Summit Counties, Ohio, to defeat and destroy the competition which was beginning to arise from the plaintiff's operations in that area (15a). The proof in this case shows that defendant's activities in this regard chiefly took two forms. First, defendant would either furnish a retail dealer in cards in the competitive area with free display cabinets or give such dealer credit for cabinets already on hand, which the dealer would then and thereafter continue to use in the display of defendant's cards.

In either case, the particular dealer continued to retain ownership of the cabinets. In view of the fact that cabinets were expensive, and that the above indicated method was burdensome on the defendant, a policy was likewise developed by defendant to give its local area sales representatives complete discretion in the use of the foregoing destructive competitive methods. Such competitive practices were used by the defendant to retain customers as well as win away from the plaintiff new accounts where a retail store was about to open.

The second competitive method developed by the defendant to destroy and defeat Ludwig competition was to grant guaranteed sales on holiday cards to retail dealers. Under this practice, the dealer was permitted to return for full credit any holiday cards remaining unsold in his stock. Here, again, such practice was used to destroy Ludwig competition in the local competitive area.

There was some proof in the record to the effect that defendant replaced Ludwig stock in a dealer's hands with defendant's cards. In certain instances the labels on the card mountings were changed from Ludwig to defendant's name. In other instances, Ludwig cards were taken out of stock at defendant's request by the dealer and removed from display.

There can be no doubt under the record in this case that the foregoing practices were engaged in by the defendant in the local Ludwig competive area to defeat and destroy Ludwig competition and only where necessary to accomplish such result.

On September 9, 1952, the Federal Trade Commission of the United States ordered the defendant, on a national basis, to forthwith cease and desist from the unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce hereinbefore set forth, as

well as other acts. Said order was issued by the Federal Trade Commission on October 23, 1952, and no appeal was thereafter taken therefrom by the defendant.

On the basis that plaintiff was a person who had been injured in his business by reason of the acts set forth herein, which are forbidden by the anti-trust laws of the United States, plaintiff filed his complaint in the United States District Court for the Northern District of Ohio, Eastern Division, alleging injury to his business in the amount of Fifteen thousand one hundred fifty eight dollars ($15,158.00). By virtue of U. S. C. Title 15, Section 15, he sought to recover treble damages ($45,474.00) together with the costs of suit and reasonable attorneys fees.

Originally, defendant filed a motion to plaintiff's complaint seeking to have the same dismissed on the ground that the pleading failed to state a claim upon which relief could be granted. This motion was based upon two premises. First, defendant contended that no acts had been alleged in plaintiff's complaint which were forbidden by the anti-trust laws of the United States. Second, it was asserted that there was no diversity of citizenship between plaintiff and defendant.

Defendant's motion to dismiss was overruled, the court stating that plaintiff's brief contra motion supplied the sections of the anti-trust laws alleged to have been violated, thereby making the charges adequately specific (10a).

After hearing, the same court (Jones, J.), which had passed upon defendant's motion to dismiss, decided the case on jurisdictional grounds against the plaintiff. The basis of the court's decision, as will appear on pages 44a and 45a of the Appendix, is contained in the following language:

"It is my considered judgment that the practices complained of, if they are unlawful or if they are wrong,—or if they have injured the plaintiff—might properly be the subject of an unfair competition suit, which, of course in this case, couldn't be conducted here because the parties are not adverse resident citizens and, therefore, the Court feeing that without jurisdiction, based upon the belief and the conviction that under the Complaint in this case the charges alleged are not such as to confer under the statute the right of private litigation on the part of the plaintiff."

The Court further said in his opinion:

"That is about all I can say about the subject. These matters of anti-trust, Clayton Act and Federal Trade Commission are very difficult ones, but I am satisfied that this it not a type of case under the facts which entitles the plaintiff to maintain a private action, in which event, of course, the Court is without jurisdiction, and I so hold."

It should be observed that this was a complete reversal of field on the part of the same Court from his previous ruling on the motion to dismiss. With reference to the matter of damages, plaintiff's proof amply sustained losses in the amount prayed for in his Complaint. The defendant offered no proof in contradiction thereof.

After the decision of the court to dismiss the action, appeal was taken in the United States Court of Appeals for the Sixth Circuit under Case No. 13549 and upon hearing the cause remanded to the District Court for further proceedings. The judge of the District Court thereafter made findings of fact and rulings of law based upon and taken verbatim from papers submitted by the defendant. These decisions and findings of fact were appealed to the United States Court of Appeals for the Sixth Circuit, under Case No. 14053 and upon hearing this court affirmed

the finding of the District Court and denied a petition for rehearing on the 29th day of November, 1960. The entries of the lower courts are set forth in the appendix of this brief.

CONCLUSION.

It is respectfully submitted by the plaintiff that the questions posed in this appeal have never been ruled upon directly by the Supreme Court of the United States. It is further submitted that the questions posed are ones which will be more frequently raised in the operation of the controls over commerce in the United States under the Interstate Commerce regulations. It is the conclusion reached by the plaintiff herein that this court should take jurisdiction of the matter on appeal and rule in his favor on these very important issues.

Respectfully submitted,

IAN BRUCE HART,
HARRY N. KANDEL,
Attorneys for Plaintiff-Appellant.

APPENDIX.

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IN APPEAL NO. 13,549.

BEFORE: SIMONS, MARTIN and MILLER, Circuit Judges.

MILLER, Circuit Judge. Appellant brought this action in the District Court to recover treble damages for alleged violation by the appellee of Section 2 of the Clayton Act, as amended by Section 1 of the Robinson-Patman Act. Sections 13 and 15, Title 15, U. S. Code. Reliance was also placed upon Section 3 of the Robinson-Patman Act, Section 13a, Title 15, U. S. Code, but subsequent to the decision of the District Court the Supreme Court decided *Nashville Milk Co. v. Carnation Co.*, 355 U. S. 373, and in view of the ruling in that case reliance upon Section 3 of the Robinson-Patman Act has been properly abandoned on this appeal.

The complaint alleges that the appellee was engaged in the business of manufacturing at its plant in Cleveland, Ohio, greeting cards together with related products, such as paper and ribbons, and selling and distributing its products in interstate commerce to more than 40,000 retail customers or purchasers throughout the United States; that the appellant, as an individual, had been engaged in the business of purchasing from manufacturers and reselling at wholesale to various retail customers and purchasers in the state of Ohio greeting cards which constituted a substantial competitive product to the greeting cards manufactured and sold by the appellee in the same territory; that the appellee in the course of its business had done certain acts, hereinafter set out more in detail, with the effect of interfering with the resale of merchandise of the appellant as a competitor, which acts had and continued to

have a tendency unduly to restrain, hinder, suppress and eliminate competition between the appellee and the appellant in the sale and distribution of greeting cards in commerce; and that appellant had been injured in his business in the amount of $15,158.00 by reason of said acts which were forbidden by the anti-trust laws of the United States.

Several specific acts on the part of the appellee are set out in the complaint, including the allegations that (1) appellee bought and took over stocks of greeting cards sold by the appellant to retail sellers and arranged with retail customers sellers of the appellant to junk and destroy stocks of greeting cards distributed to such retail sellers by the appellant, (2) that appellee furnished new greeting card display cabinets free of charge to retail sellers formerly serviced by the appellant, provided said retail sellers would transfer their business from the appellant to the appellee, (3) that appellee offered to repurchase greeting card display cabinets from retail sellers, and to pay a cash bonus to such retail sellers as an inducement to drop the line of greeting cards supplied by the appellant and to take on cards supplied by the appellee, and (4) that appellee agreed to place former retail customers of the appellant on a consignment basis in order to induce such customers to transfer their business from appellant to appellee.

The material allegations of the complaint were denied by the appellee. After hearing evidence, the District Judge sustained the motion of appellee for judgment and entered an order dismissing the complaint, from which this appeal was taken.

In making his ruling, the District Judge referred to the fact that diversity of citizenship did not exist, and stated that although the acts complained of might properly be the subject of an unfair competition suit in the state

court, in his opinion, they were not such as to confer under the statute a right on the part of the plaintiff to maintain a private action in the District Court, and that he was without jurisdiction to consider it. He made no findings of fact with respect to whether the appellee had or had not engaged in the practices complained of, or what practices the appellee had engaged in in its competition with the appellant. Accordingly, we have no findings of fact to review in the light of the evidence or to use as a basis for deciding whether they support the District Judge's conclusion of law. On the contrary, the District Judge stated in his opinion that "under the *complaint* in this case the charges *alleged* are not such as to confer under the statute the right of private litigation on the part of the plaintiff" (emphasis added). In view of that statement and in the absence of findings, we will only consider on this review whether the charges alleged in the complaint constitute a violation by the appellee of the anti-trust laws of the United States, and, if so, whether the appellant is a person within the meaning of Section 15, Title 15, U. S. Code, who has been injured in his business or property by reason thereof. If we decide those questions in the affirmative, the judgment must be reversed. Section 15, Title 15, U. S. Code.

The answer to this question is found by a consideration of Section 2, subsections (a) through (e) of the Clayton Act as amended by the Robinson-Patman Act, Section 13 (a)-(e), Title 15, U. S. Code. *Nashville Milk Co. v. Carnation Co., supra,* 355 U. S. 373, 378-379, 382.

Appellee contends that the complaint does not allege any discrimination in price by it between different purchasers of its greeting cards, which is a requirement under Section 2 (a) of the Act. Section 13 (a), Title 15, U .S. Code. The statute makes unlawful price discrimination

which is either direct or indirect. Various trade practices have been held to constitute indirect price discrimination. Examples are the inclusion of improper freight rates, the granting to favored customers of purchase options at existing prices in a rising market, special discounts, and special rebates. *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726, 740; *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37, 42-44; *Moog Industries, Inc., v. Federal Trade Commission*, 238 F. (2) 43, 50, C. A. 8th, affirmed 355 U. S. 411, rehearing denied, 356 U. S. 905. We are of the opinion that placing former retail customers of the appellant on a consignment basis in order to induce such customers to transfer their business to the appellee, as charged in the complaint, constitutes in substance a prima facie case of indirect price discrimination. It is true that such a prima facie case may be rebutted, but the burden of doing so is upon the person charged with the violation. Section 2 (b) of the Act, Section 13 (b), Title 15, U. S. Code. The District Judge did not reach or pass upon such an issue.

Other types of discrimination are made unlawful under subsections (c), (d) and (e) of the Act, Sections 13 (c), (d) and (e), Title 15, U. S. Code. Subsection (c) makes it unlawful to pay or grant a commission or compensation, except for services rendered, in connection with the sale of goods, wares or merchandise. Subsection (d) makes it unlawful to pay anything of value in consideration for any services or facilities furnished by a customer in connection with the handling or offering for sale of any products sold to him, unless such consideration is available on proportionally equal terms to all other customers competing in the distribution of such products. Subsection (e) makes it unlawful to discriminate in favor of one purchaser against another purchaser of a commodity bought

for resale by furnishing any services or facilities connected with the handling of such commodity so purchased, upon terms not accorded to all purchasers on proportionally equal terms. We believe that the furnishing by appellee of new greeting card display cabinets free of charge to retail sellers formerly serviced by the appellant and the payment of a cash bonus to certain retail customers of the appellant as an inducement to purchase appellee's cards instead of appellant's, as charged in the complaint, constitute a violation of these sections of the statute. *Elizabeth Arden Sales Corp. v. Gus Glass Co.*, 150 F. (2) 988, C. A. 8th cert. denied, 326 U. S. 773, *Elizabeth Arden, Inc., v. Federal Trade Commission*, 156 F. (2) 132, C. A. 2nd; *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp.*, 178 F. (2) 150, C. A. 2nd; *United Cigar-Whelan Stores Corp. v. H. Weinreich Co.*, 107 F. Supp. 89, 91, S. D. N. Y.; *National Nut Co. v. Kelling Nut Co.*, 61 F. Supp. 76, 83, N. D. Ill.

The opinion of the District Judge indicates that the principal reason for his ruling was because this action was on behalf of a competitor of the appellant rather than by a customer claiming discrimination between himself and another customer. The present action by a competitor appeared to him to be more in the nature of unfair competition than a violation of the anti-trust laws. It may be that appellant might have a cause of action for unfair competition, but such remedy is not an exclusive one. The Act has been construed as giving a right of action to a competitor who is injured in his business as well as to a customer who has been discriminated against. *Moore v. Mead's Fine Bread Co.*, 348 U. S. 115, 118; *Mandeville Island Farms, Inc., v. American Crystal Sugar Co.*, 334 U. S. 219, 236; *Central Ice Cream Co. v. Golden Rod Ice Cream Co.*, 257 F. (2) 417, 418, C. A. 7th; *Kentucky-Tennessee Light & Power Co. v. Nashville Coal Co.*, 37 F. Supp. 728, 735,

W. D. Ky., affirmed, 136 F. (2) 12, C. A. 6th; *Streiffer v. Seafarers Sea Chest Corp.*, 162 F. Supp. 602, 607, E. D. La.

Certain affirmative defenses pleaded by the appellee were not involved in the District Court's ruling and have not been considered on this review. They remain open for a ruling by the District Judge in the further proceedings in this case.

The judgment is reversed and the case remanded to the District Court for further proceedings consistent with the views expressed herein.

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IN APPEAL NO. 14,053.

(Decided October 12, 1960.)

Before: MARTIN, MILLER and WEICK, Circuit Judges.

PER CURIAM. Appellant brought this action in the District Court to recover treble damages for alleged violation by the appellee of Sec. 2 of the Clayton Act, as amended by Sec. 1 of the Robinson-Patman Act. Sections 13 and 15, Title 15, U. S. Code.

On a prior appeal, a judgment for the defendant, based upon the pleadings, was reversed, the Court being of the opinion that the allegations of the complaint stated a cause of action. The case was remanded to the District Court with instructions that the District Judge make findings of fact with respect to whether the appellee had or had not engaged in the practices complained of. We also pointed out that certain defenses pleaded by the appellee remained open for a ruling by the District Judge in the further proceedings in the case. *Ludwig v. American Greetings Corp.*, 264 F. (2) 286, C. A. 6th. A statement of the controversy will be found in the opinion in that case.

Following remand, the District Judge made detailed findings of fact, uopn which judgment for the appellee was again entered, followed by this appeal.

The District Judge held that the furnishing by appellee of greeting card display cabinets to its customers free of charge in the area involved, did not violate subsection (e), Sec. 2, of the Act, Sec. 13(e), Title 15, U. S. Code, because such action did not constitute discrimination among competing *purchasers* as contemplated by such subsection. He also found as a fact that in order to meet the competition afforded by a competitor's no-charge cabinet policy, appellee in good faith likewise began giving, and thereafter did give its customers in the territory cabinets free of charge.

With respect to deliveries on consignment, being so-called guaranteed sales to customers, the District Judge held that such sales by appellee did not violate subsection (a), Sec. 2, of the Act, because neither the tendency nor the effect of such discrimination was to substantially lessen competition or tend to create a monopoly or to injure, destroy or prevent competition as contemplated by subsection (a), but rather the tendency and effect was to enhance competition by duplicating inducements being offered by competitors. He also found as fact that in order to meet the competition afforded by appellant's guaranteed sales policy, appellee in good faith likewise gave its customers the guaranteed sales privilege.

In our opinion, the findings of fact are supported by the evidence, are not clearly erroneous, and must be accepted on this review.

Subsection (b) of Sec. 2, of the Act, Sec. 13(b), Title 15, U. S. Code, provides that nothing contained in Sec. 2 of the Act shall prevent a seller rebutting a prima facie case made against him by showing that his lower price or

the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

The ruling of the District Judge in dismissing the action based upon the foregoing findings was a correct application of the provisions of the Act. See: *Federal Trade Commission v. Simplicity Pattern Co., Inc.*, 360 U. S. 55, 66-67; *Standard Oil Co. v. Federal Trade Commission*, 340 U. S. 231, 246-251.

The judgment is affirmed.

ORDER DENYING PETITION FOR REHEARING IN APPEAL NO. 14,053.

Before: MARTIN, MILLER and WEICK, Circuit Judges.

Appellant's petition for rehearing having been considered by the Court:

IT IS ORDERED that said petition for rehearing be denied.

Approved for entry:

SHACKELFORD MILLER, JR.,
United States Circuit Judge.

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vs.

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Appellee.

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FOR THE SIXTH CIRCUIT.

MOTION TO DISMISS.

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OCTOBER TERM, 1960.

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Appellee.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MOTION TO DISMISS.

Appellee, pursuant to Rule 16 1. (a) of the Revised Rules of the Supreme Court of the United States, moves that this appeal be dismissed on the ground that it is not within the jurisdiction of this Court.

MEMORANDUM IN SUPPORT OF MOTION.

An appeal from a Federal Court of Appeals lies only under 28 U. S. C. §§ 1252 and 1254(2). Before an appeal will lie under those sections, however, either an Act of Congress must have been held unconstitutional or a State statute must have been held invalid as repugnant to Federal law. Manifestly, neither of those jurisdictional prerequisites exists in this case. Accordingly, this Court is without jurisdiction and the appeal must be dismissed.

Appellant suggests in his Jurisdictional Statement that this Court has jurisdiction to review the judgment below by certiorari under 28 U. S. C. § 1254(1). Congress has provided, however, in 28 U. S. C. § 2101(c) that any

such petition for a writ of certiorari must be applied for within ninety days after entry of the judgment below. This requirement is jurisdictional. E.g., *Toledo Scale Co. v. Computing Scale Co.*, 261 U. S. 399 at 418 (1923).

The final judgment in this case was entered on November 29, 1960 as appellant admits. Appellant therefore had until February 27, 1961 to file a petition for a writ of certiorari since no extension of time was granted. The Jurisdictional Statement was filed in this Court on March 14, 1961, well after expiration of the statutory period. It is therefore out of time as a petition for a writ of certiorari and the Court has no jurisdiction to consider it as such. The statute, 28 U. S. C. § 2103, permitting an improvident, but timely, appeal from a State court to be treated as a "duly presented" petition for a writ of certiorari has no counterpart applicable to improvident appeals from Federal courts.

The appeal must be dismissed.

Respectfully submitted,

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